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Nos. 02-1472 & 03-853

IN THE

Supreme Court of the United States

CHEROKEE NATION OF OKLAHOMA AND
SHOSHONE-PAIUTE TRIBES OF THE
DUCK VALLEY RESERVATION,
Petitioners,

v.

TOMMY G. THOMPSON, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL.
Respondent.

**On Writs of Certiorari
to the United States Courts of Appeals
for the Tenth and Federal Circuits**

BRIEF OF *AMICUS CURIAE* SELDOVIA VILLAGE TRIBE IN SUPPORT OF PETITIONERS CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

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GLOSSARY OF ACRONYMS

AFA	Annual Funding Agreement
CSC	Contract Support Costs
DHHS	Department of Health and Human Services
IBCA	Interior Board of Contract Appeals
IHS	Indian Health Service, an Agency of the DHHS
ISDA	Indian Self-Determination & Education Assistance Act
ISDM	Indian Self-Determination Memorandum
NCAI	National Congress of American Indians

BRIEF OF *AMICUS CURIAE* SELDOVIA VILLAGE TRIBE IN SUPPORT OF PETITIONERS CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES

INTEREST OF *AMICUS* [1]

Amicus Seldovia Village Tribe is a federally recognized Indian tribe, located in the lower Cook Inlet region of Alaska, that provides health care to eligible beneficiaries in its geographic area pursuant to the Indian Self-Determination and Education Assistance Act (commonly referred to as "ISDA"). This Act, and Seldovia's health care contractual agreement with the Department of Health and Human Services ("DHHS"), require the Indian Health Service ("IHS") to fund Seldovia's direct cost of providing health care, and also for all of its negotiated administrative costs related thereto (called "Contract Support Costs" or "CSC"), subject to "availability of appropriations."

The IHS has refused to pay Seldovia all of its CSC on the grounds that there are insufficient congressional appropriations "available." This legal issue is the same one that is involved in the instant cases before the Court, and the answer here will also determine the issue in Seldovia's case. However, even if the tribes win this main issue in the instant cases, the IHS has a fallback position that it argues will bar Seldovia's claim for underfunding. That is, that IHS need not pay damages to Seldovia because Seldovia supposedly *agreed* to

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[1] All parties have consented to the filing of this brief, and their consents have been filed with the Clerk. No counsel for a party authored this brief in whole or part, and no person other than *amicus* made a monetary contribution to the preparation or submission of this brief, except that monetary contributions were or may be made by the Council of Athabascan Tribal Governments, the Bristol Bay Area Health Corporation, the Mississippi Band of Choctaw Indians, the Menominee Tribe of Indians of Wisconsin, and the Lac Courte Oreille Band of Chippewa Indians.

the underfunding. This fallback position is not involved in the instant case, but we call the Court's attention to it in the belief that the Court will find it at least of background relevance to its handling of the main issue in the instant case.

On October 20, 2003, the Interior Board of Contract Appeals ("IBCA") ruled that Seldovia is entitled to recover for the underfunding for 1996 and 1997; that Seldovia did not agree to the underfunding; and that even if it did, the IHS could not contractually force the Tribe to accept less than the full CSC the Tribe was entitled to by law. See Opinion, Appendix A attached. The IHS has appealed Seldovia's case to the Court of Appeals for the Federal Circuit, which has stayed the case to await the decision of this Court in the instant cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ISDA mandates the payment of contract support costs ("CSC") to Indian tribes that contract with the Secretary of the DHHS to provide health care services, subject only to "availability of appropriations."[2] In the instant cases before the Court, *Cherokee Nation and Shoshone-Paiute Tribes v. Thompson*, No. 02-1472, from the Tenth Circuit, and *Thompson v. Cherokee Nation*, No. 03-853, from the Federal Circuit, the Court will decide the main issue of whether the IHS's refusal to pay the full amount of tribes' CSC, on the grounds that insufficient appropriated funds were "available,"

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[2] 25 U.S.C. § 450j-1(b). The provision of funds "is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter." In this case no question arises of money being taken away from other tribes to fully fund Cherokee's or Seldovia's CSC. As the Secretary admitted, the IHS had leftover unexpended balances at the end of the pre-cap fiscal years available for reprogramming to meet the agency's contractual obligations. *Thompson*, 334 F.3d at 1094.

comported with the intent of Congress in the ISDA.[3] The Tenth Circuit upheld the IHS's interpretation of "available" in the ISDA, while the Federal Circuit rejected it.[4]

Amicus Seldovia fully supports the arguments of the Cherokee Nation and *amicus* National Congress of American Indians ("NCAI") on that main issue and will not reiterate those arguments here. The purpose of this brief is to call the Court's attention to a fallback argument that the IHS has made in the Seldovia case, and will make again in the event that it loses the instant cases.[5]

Even if the ISDA is interpreted as the Cherokee Nation argues, so that the Tribe is entitled to full CSC funding, the IHS will argue that Seldovia (and other similarly situated tribes) is still not entitled to full CSC funding because the Tribe's *Annual Funding Agreements* refer to an IHS document (ISDM 92-2) which declares IHS's policy to underfund tribes' CSC if the congressional committees fail to specifically earmark sufficient funds to meet all CSC requirements. This scenario occurred in 1996 and 1997, when the committees were silent. But Congress did not indicate any intention to underfund CSC *in the IHS appropriations Acts*, and IHS appropriations were therefore "available." The IBCA found in Seldovia's case that because funds were in fact "available," the IHS's policy to underfund based on committee action (not Congress's action) was its own doing, not Congress's. In addition, the IBCA held that Seldovia could not be forced to

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[3] The ISDA provides that "Each provision of the [ISDA] . . . shall be liberally construed for the benefit of the [tribal] Contractor. . . ." 25 U.S.C. § 450*l*-(c). See also discussion of full legislative history in the amicus brief of The National Congress of American Indians.

[4] *Cherokee Nation of Okla. and Shoshone-Paiute Tribes v. Thompson*, 311 F.3d 1054 (10th Cir. 2002); *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003).

[5] The Government argument on this fallback issue is printed below at Appx. B.

agree to contract terms contrary to Congress's intention that CSC be fully funded, at least not when appropriations were "available."

If this Court is going to rule in favor of the Cherokee Nation on the main issue, as Seldovia hopes, it will likely be on the ground argued by the Cherokee Nation—that given "available" funds, Congress intended that tribes be paid their full CSC requirements. If Congress intended that tribes be paid their full CSC requirements, then any IHS policy inconsistent with that must be ineffective, even if embodied in an Annual Funding Agreement. The IHS may not rely on its own policy pronouncement to shirk its duty to pay full CSC or to impose contract terms that are contrary to Seldovia's right to full funding granted by Congress, see discussion below.

BACKGROUND

For *seven years*, Seldovia has been pursuing full payment of its CSC for fiscal years 1996 and 1997. In 1995, Seldovia and the Office of Cost Allocation in DHHS agreed that Seldovia was entitled to a higher CSC rate. In January 1996, Seldovia submitted to the IHS (an agency of DHHS) its proposed amendments to its FY 1996 Annual Funding Agreement to reflect the higher CSC need in the new negotiated rate. The IHS refused to incorporate the amendment because, it claimed, no funds were "available" to pay for the agreed increases, even though the IHS had discretionary funds available that could properly have been spent for this purpose.

In June 1997, Seldovia filed appeals with the IBCA of decisions by the contract officer denying the Tribe's claims for unpaid CSC in the amount of $126,439 in each of FYs 1996 and 1997. The IBCA decided the main issue in Seldovia's favor (that Congress intended tribes' CSC needs to be fully funded, if necessary out of discretionary portions of

the IHA appropriation).[6] The Board also rejected the IHS's fallback argument (that Seldovia's Annual Funding Agreement contractually waived the benefit of the main holding). The IHS had argued that it had an unpromulgated internal agency guideline for underfunding CSC payments to tribes, namely Indian Self-Determination Memorandum (ISDM) 92-2.[7] This document set forth the agency's determination that CSC allocations to tribes would be limited in the following manner: "If funds *available* in the Area's indirect cost base are not adequate to meet total requirements, then the amount *available* shall be distributed according to each contractor's proportion of total need." ISDM 92-2 § 6 (emphasis added).

ISDM 92-2 did not define the term "available," but the IHS asserted in its brief that the only funds available to fund Seldovia's indirect cost increase were those which the agency had "allocated to the Alaska Area for its indirect cost base." IHS Supplemental Brief before the IBCA (Appendix B) at 25a. This allocation, in turn, depended on "the distribution to the IHS Areas of the CSC funds earmarked in the appropriation committee reports for fiscal years 1996 and 1997." *Id.* at 24a. "The [sic] were no new funds allocated to the Area's indirect cost base" pursuant to the appropriation committee's recommendations in those fiscal years,[8] so, pursuant to ISDM

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[6] See IBCA Opinion at Appx. A below.

[7] Successor policy documents provided similar guidance for allocating funding in the face of what the agency felt were CSC shortfalls due to lack of "available" funds. *See* IHS Circular 96-04 at 13. The Seldovia case, like the instant cases before this Court, involves the years before Congress, in FY 1999, began placing statutory caps on CSC funding in each year's appropriation bill. *See, e.g.*, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-278 to 2681-279 (1998).

[8] Appx. B at 25a. The Board noted that in both of the years involved, the IHS failed to request adequate CSC to cover the existing shortfalls. Appx. A at 10a.

92-2, the IHS policy was not to compensate Seldovia for its full CSC. Since ISDM 92-2 was cross-referred to in the Annual Funding Agreement, the IHS argued that this policy was agreed to by Seldovia.[9]

The IBCA rejected the IHS's argument, and held that the language referring to ISDM 92-2 in the Annual Funding Agreement reflected the IHS's position about the applicability of ISDM 92-2 and not an agreement with Seldovia, and that, in any event, even if Seldovia had specifically agreed to it, the IHS could not force Seldovia to accept less than what Congress had intended be paid under the ISDA. Appx. A at 12a-16a.

ARGUMENT

I. The IHS Cannot Force a Tribe by Contract to Accept Less Contract Support Costs than the Tribe Is Entitled to by Statute.

In *MAPCO Alaska Petroleum, Inc. v. United States*, 27 Fed. Cl. 405 (Fed. Cl. 1992), the Court of Federal Claims held that the United States could not force a contractor to abide by a contract provision contrary to the law. In *MAPCO*, the Government's contract to buy fuel from a petroleum company contained an economic price adjustment ("EPA") clause contrary to the Federal Acquisition Regulations ("FARs"). Had the Government complied with the FARs provision, it would have paid the contractor a higher amount than it paid under the contract term. The Government argued that MAPCO waived its right to protest the contract

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[9] The Annual Funding Agreement provided: "[t]he parties have not agreed on the amounts to be paid or the method and process for calculation and payment of contract support costs under the AFA. . . . It is the position of the IHS that any payment of or calculation of contract support costs shall be made in accordance with" ISDM 92-2 or its successor. Despite this plain language, the IHS insisted that Seldovia had acquiesced contractually to ISDM 92-2 and thus to underpayment of CSC. Appx. B at 21a.

by acquiescing to the Government's insistence on the EPA clause.

The court held the EPA portion of the contract unenforceable and invited MAPCO to submit documentation of damages, despite the fact that MAPCO had agreed to the EPA clause in the contract. The court explained, "'When a contract clause drafted by the Government is inconsistent with law, whether the [contractor] inquired, protested, accepted or otherwise assumed any risks regarding the same is not controlling; the impropriety will not be allowed to stand.'" *Id.* at 416 (quoting *Craft Mach. Works, Inc.*, 90-3 B.C.A. 23,095 at 115,969, 1990 WL 133158 (ASBCA June 29, 1990)). The *MAPCO* court's decision accords with the well-established principle that when a government contract is inconsistent with the law, the other party is not bound to that inconsistency by estoppel, acquiescence or failure to object, and is entitled to what the statute or regulation requires of the government.[10]

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[10] *See Chris Berg, Inc. v. United States*, 426 F.2d 314, 317 (Ct. Cl. 1970) (granting a contractor reformation of the contract to provide an additional $41,000 despite the fact he signed and performed the contract as bid, where the contract provision violated the Armed Services Procurement Regulations); *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1061 (Fed. Cir. 2001) (affirming Court of Federal Claims' grant of *quantum valebant* relief when standard government price adjustment clause held to violate the FARs); *Rough Diamond Co. v. United States*, 351 F.2d 636, 640 (Ct. Cl. 1965) (discussing principle that when contractor is intended beneficiary of the statute, contract provision contrary to statute cannot stand); *Nautilus Shipping Corp. v. United States*, 158 F. Supp. 353, 355 (Ct. Cl. 1958) (when the Government imposed an additional charge on the buyer of a U.S. ship in violation of the statutory price formula in the Merchant Ship Sales Act, "One does not irrevocably subject himself to an improper charge by estoppel or acquiescence or mistake or ignorance of law or failure to protest."); and *LaBarge Products, Inc. v. West*, 46 F.3d 1547, 1552 (Fed. Cir. 1995) (contract reformation available despite contractor's initial compliance with the contract provision later shown to be illegal).

Just as the Government sought to apply the illegal EPA clause in *MAPCO*, the IHS seeks to apply ISDM 92-2 to reduce Seldovia's CSC recovery despite the ISDA's mandate of full CSC payment, as recognized by the Federal Circuit in the *Thompson* case, and by the IBCA in Seldovia's case. ISDM 92-2 purported to limit "available" funds for payment of Seldovia's CSC shortfalls to the amount allocated by the IHS solely to the Alaska Area for its indirect cost base. ISDM 92-2 § 6; Appendix B below at 25a.

However, in *Thompson* the Federal Circuit held that "available funds" include all funds available in a lump sum appropriation that the Secretary has the authority to reprogram, other than funds committed directly to other tribes by the IHS, see note 2 above, and that in the years at issue in the case the Secretary had ample available funds to reprogram. 334 F.3d at 1088, 1094. The Court also held that "an agency is *required* to reprogram if doing so is necessary to meet debts or obligations. In other words, '[i]n some situations, the agency's discretion may rise to the level of a duty.'" *Id.* at 1086 (internal citations omitted, emphasis in original). If *Thompson* was correctly decided, as Seldovia believes, then ISDM 92-2 is inconsistent with the law, so a contract provision that attempts to apply ISDM 92-2 is unenforceable. When a contract clause violates the law, "the government can not, by law, benefit from it."[11]

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[11] *Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988); *Rough Diamond Co. v. United States*, 351 F.2d 636, 639-40 (Ct. Cl. 1965).

II. Because Indian Tribes Are the Intended Beneficiaries of the ISDA, the Rule that the Government May Not Benefit from Contract Provisions at Odds with the Statute Applies with Special Force.

The principle that a contractor is not bound by contract terms that violate a statute applies with special force when the contractor is part of a group the statute is designed to protect. *Rough Diamond Co. v. United States*, 351 F.2d at 639-40. In *Rough Diamond*, the court cited several ship sale cases holding that the Government could not vary the terms prescribed by the Merchant Ship Sales Act even though the buyers freely agreed to the unlawful terms; buyers were awarded the excess amounts paid. *Id.* at 639. Because the ship purchasers were the direct beneficiaries of Congress's concern in passing the statute, the government agency was not free to force the contractor to agree to a circumvention of the legislative intent. *Id.* at 640.[12]

Similarly, and as set forth in more detail in the Cherokee Nation's brief and NCAI's *amicus* brief, tribes are the direct beneficiaries of the legislative concerns that resulted in Congress enacting and amending the ISDA, which includes language spelling out the explicit right of tribes to be paid CSC. Where the ISDA's terms are explicit and provide "overwhelming evidence that Congress intended the [ISDA]

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[12] By contrast, in *Rough Diamond* itself, the court found that the Agricultural Trade Development and Assistance Act of 1956, 7 U.S.C. § 1692, was intended primarily to benefit farmers, not the plaintiff commodity traders, so the Secretary of Agriculture could charge the traders a price higher than the "competitive world prices" referenced in the statute, particularly as the statute specifically authorized acceptance of higher bids. 351 F.2d at 642.

to limit the Secretary's discretion in funding matters,"[13] the IHS is not free to deviate from those terms by forcing the contractor to agree to the deviations.

The Seldovia case makes clear that the IHS will continue to actively and vigorously seek to circumvent the Federal Circuit's statutory ruling in *Thompson* one contract at a time, arguing that any ISDA agreement referring to ISDM 92-2 gives the agency the right to ignore the statute and pay less than full CSC to the Tribe. However, as demonstrated above, and as properly held by the IBCA in Seldovia's IBCA case, if the Federal Circuit's decision in *Thompson* is upheld, tribes must be paid the full CSC funds to which the ISDA entitles them, despite the Agency's assertion that a contract provision referencing an unpromulgated internal guideline trumps the statute.

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[13] *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338, 1347 (D.C. Cir. 1996); *id.* at 1344 ("Congress left the Secretary with as little discretion as feasible in the allocation of [CSC]").

CONCLUSION

We respectfully suggest that the Court, as it resolves the main issue of whether the IHS's narrow interpretation of "available" in the ISDA was consistent with the intent of Congress in situations such as those at bar, be aware of IHS's fallback argument on a related issue not directly presented here; *viz.*, that the IHS can circumvent Congress's intent by forcing contractors to agree to the circumvention.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DEPARTMENT OF THE INTERIOR
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APPEALS OF SELDOVIA VILLAGE TRIBE

Decided: October 20, 2003

IBCA 3862 & 3863/97

Compact No. 58G950029-01-2
FY 1996 and 1997 Funding Agreements
Indian Health Service, HHS

Appellant's Motion for Summary Judgment Granted; Government's Motions for Summary Judgment and to Dismiss Denied

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OPINION BY ADMINISTRATIVE JUDGE PARRETTE

Seldovia Village Tribe (Appellant or the Tribe) of Alaska has appealed two reductions in payments by the Indian Health Service (IHS) under the Tribe's FY 1996 and FY 1997 Annual Funding Agreements (AFA's). Appellant alleges that IHS failed to pay the Tribe its full contract support costs (CSC's) of $126,439 in each of those years, amounts not in dispute. IHS contends that the CSC reductions were the result of inadequate appropriations by the Congress, and avers that the Tribe's CSC reductions were both proper and proportionately the same as those experienced by other CSC recipients.

The appeals were filed in June 1997 and assigned to Judge Cheryl Rome, who is no longer with the Board. They were deferred for Board consideration because the issue of the propriety of CSC reductions was already before the Board in similar case, Cherokee Nation, which was ultimately reviewed by Court of Appeals for the Federal Circuit. *See* Appeals of *Cherokee Nation of Oklahoma*, IBCA 3877-79, 99-2 BCA 30,462; reconsideration granted at 01-1 BCA 31,158; decision unchanged at 01-1 BCA 31,349 (hereafter "Cherokee"). The Board's decision was affirmed in *Thompson v. Cherokee Nation of Oklahoma*, 334 F. 3d 1075, 2003 U.S. App., LEXIS 13483. Familiarity with *Thompson* is presumed for the purposes of this opinion.

Further information on IHS's Title III Self-Determination program can be found in *Shoshone-Bannock Tribes v. HHS*, 279 F. 3d 660 (9th Circuit 2002) and in *Cherokee Nation v. Thompson*, 311 F. 3d 1054 (10th Circuit 2002). Both Circuits have decided appeals similar to this one in favor of the Government rather than the appellant. This Board, however,

agrees with the decision of the Federal Circuit in *Thompson*, which is binding for us in any event.

Appeal Background

The present Appeals were filed pursuant to the Indian Self-Determination and Education Assistance Act (ISDA or the Act), which authorizes IHS to award to tribal organizations the same amounts that IHS would have spent in providing services to them, in order to enable the tribes to administer the programs themselves. Under Title III of the Act, the Secretary of HHS enters into Compacts with tribes to provide these funds, known as Secretarial funds, to enable them to provide health services to eligible Indians pursuant to Annual Funding Agreements. In addition, the tribes are entitled to funds to cover the administrative costs of the programs, called contract support costs, based on a rate arrived at through negotiation between the tribe and the cognizant Federal agency. The only limitation on the resulting CSC funding is that the funds must come out of, and may not exceed, available appropriations.

During the years in question, IHS experienced shortfalls in the amounts recommended by the Congressional Appropriations Committees for CSC use, even though total ISDA appropriations were increasing each year. These reductions were not incorporated into the legislation itself but were only Committee recommendations. Nevertheless, IHS treated them as mandatory directives and apportioned the funds as recommended, despite the fact that the entitlement to full CSC funds was arguably required under 25 U.S.C. sec. 450j-l(a) and that adequate funds for CSC purposes were available under the ISDA general appropriation.

Although the present Appeals predated *Thompson* and involve the same issues, IHS argues here that because the tribe's AFA's expressly provided that funding was to be in accordance with IHS's existing policy memorandum, which

called for the allocation of funds only within the limits of the Appropriation Committee's recommendation, full CSC payments were not required. Thus, IHS believes that the facts in this case differ from those in *Thompson*, and that *Thompson* is inapplicable. Appellant challenges this view, and both parties have moved for summary judgment.

These issues have been briefed at great length. Despite the Government's extensive arguments to the contrary, we hold that these appeals are within the ambit of *Thompson* and grant summary judgment for the reasons set forth in that decision. However, because they involve issues of first impression with respect to the Alaska tribes, it may be useful to set forth the general background of the Appeals as provided by Appellant in its Summary Judgment Motion. We will then address IHS' contention that Seldovia legally contracted away its entitlement to full CSC payments when it signed its Annual Funding Agreements.

Contract Background

A. *History of Title III Compacting*

The Indian Self-Determination and Education Assistance Act (ISDA), Pub.L. 93-638, 88 Stat. 2206 (Jan. 4, 1975), 25 U.S.C. § 450 *et seq.* was enacted by Congress in 1975, and has since been amended on a number of occasions. The ISDA allows tribes or tribal organizations to enter into agreements with the IHS to administer programs, functions, services or activities (PFSAs) which the IHS has operated for Indian tribes and their members. As originally enacted, the only mechanism for tribes to assume such PFSAs was through Title I contracts, which limited the flexibility of tribes to administer programs to accommodate unique local circumstances.

Thus, in 1988 Congress enacted Public Law 100-472, which formally established the Tribal Self-Governance Demonstration Project (Title III), 25 U.S.C. § 450f note. Title III

directed the Secretary of the Interior to initiate the Project as a five-year experiment involving up to 20 tribes. Under this Project, participating tribes were given the option of negotiating compacts and annual funding agreements (AFA's) with the Secretary of the Interior for the operation of DOI programs for Indians. In accordance with such compacts, tribes are authorized to administer such PFSA's and receive funds from all levels of the agency to perform these responsibilities—funds that the Secretary otherwise would have spent to perform the PFSAs. In addition to these "Secretarial funds," tribes are also entitled to CSC funds to cover the administrative costs of operating the programs.

The AFA, which is to be negotiated as part of a compact and re-negotiated each year, establishes the funding levels for operating the programs in the compact. With certain limitations, tribes are authorized to redesign and reallocate program funds on the basis of tribal priorities.

On December 4, 1991, President Bush signed the Tribal Self-Governance Demonstration Project Act, Public Law 102-184, into law. Among other things, this Act amended Public Law 100-472 to establish an Indian Health Service Self-Governance Demonstration Project and directed IHS to study the feasibility of expanding the Project to IHS programs and services. In 1992 Congress again amended Title III by enacting Section 314 of the Indian Health Amendments of 1992.[1] The 1992 amendments authorized the Secretary of the Department of Health and Human Services (HHS) to negotiate Self-Governance compacts and AFAs with tribes that had completed the required planning activities.

B. *The Alaska Tribal Health Compact*

In 1994, 13 tribes and tribal organizations in Alaska negotiated and signed the Alaska Tribal Health Compact (ATHC)

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[1] Public Law 102-573.

and AFAs authorizing them to operate health care programs under Title III in fiscal year 1995. The ATHC was subsequently signed by the Director of IHS on behalf of the Secretary of HHS. The ATHC and AFAs went into effect on October 1, 1994, after having been filed with the Congress for review by the Senate Committee on Indian Affairs and the House Committee on Natural Resources, and other affected tribes, as required by law.

Since 1994, a number of other tribes and tribal organizations in Alaska have become co-signers of the ATHC and have negotiated AFAs thereunder, including the Public Law 102-573. Appellant Seldovia Village Tribe. To date, 18 tribes and tribal organizations from throughout Alaska are signatories to the ATHC. As a result, the vast majority of the IHS programs in Alaska are currently operated under tribal administration in accordance with the provisions of Title III and the ATHC.

C. *Calculation of Contract Support Costs*

The Indian Self-Determination Act requires the Secretary to pay full contract support cost funding to a contracting or compacting tribe in addition to the Secretarial amount for direct program funding. 25 U.S.C. 450j-l(a)(2); CSC funds "cover the full administrative costs the Tribe will incur—and which, absent the self-determination contract, the Federal government would incur—in connection with the operation of [direct Indian] programs." *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338, 1341 (D.C. Cir. 1996); *see also* 25 U.S.C. § 450b(f).

One aspect of CSC is "indirect costs." The ISDA defines these as "costs incurred for a common or joint purpose benefitting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved;" 25 U.S.C. § 450b(f). The amount of indirect costs

to which a tribal contractor is entitled is based upon a rate which is "arrived at through negotiation between an Indian tribe or tribal organization and the appropriate Federal agency." 25 U.S.C. § 450b(g). The ISDA provides that funds for all such CSC "*shall be added*" to the tribe's contract. 25 U.S.C. § 450j-l(a)(2)(emphasis added). The only limitation is that all funding is "subject to the availability of appropriations." 25 U.S.C. § 450j-l(b).[2]

D. *Use of ISDM 92-2 to Distribute Contract Support Funds*

IHS utilizes ISDM 92-2,[3] an unpromulgated, internal agency guideline, to determine and allocate "contract support funds for all Public Law (P.L.) 93-638 contracts." ISDM 92-2 at 2 (Appt. Exh. H). Through this mechanism, the IHS limits the availability of CSC funding for ongoing contracts and compacts to a predetermined amount based on the level of prior year CSC funding to each Area Office. In the case of ongoing contracts, ISDM 92-2 (pg. 7) provides:

> The amount of indirect contract support funds representing the previous year's base will be distributed to Areas "recurring" [4] to fund each Area's indirect cost need. Each contractors' need for indirect contract

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[2] As noted by the court in *Shoshone-Bannock Tribes v. Shalala*, 988 F. Supp. 1306, 1329 (D. Or. 1997), "CSC are automatically awarded as a percentage of the tribe's Secretarial Amount, but funding is 'subject to the availability of appropriations' and the Secretary's need to serve non-contracting tribes."

[3] In 1996, ISDM 92-2 was superseded by ISDM 96-04, which is consistent in relevant parts with its predecessor. However, for purposes of this appeal, ISDM 92-2 was the applicable guideline at the time that the Tribe entered into both its FY 1996 and FY 1997 AFAs from p. 8a.

[4] ISDM 96-04 (pg. 2) defines "recurring funds" as "Contract or compact funds that do not require rejustification each year to the Secretary. Annual increases are provided through congressional mandatory increases or other resource allocation methodologies applicable to the respective funding category of the award."

> support shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If funds **available** in the Area's indirect cost base are not adequate to meet total requirements, then the amount **available** shall be distributed according to each contractor's proportion of total need. *These funds will be awarded to the contractor as non-recurring funds*, (underline in original, bold added).

The term "available" is not defined by ISDM 92-2. However, historically IHS has only increased the funds "available" for CSC to the extent that such an increase is recommended in the Conference Committee Report that accompanies the IHS' annual appropriation. Thus, this limitation on the funds available for CSC is not based upon any statutory mandate, but is only based upon Committee *recommendations*.

E. *Congressional Appropriations for the IHS*

The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) appropriated the following lump-sums for the Indian Health Service for FY 1996:

> *For expenses necessary to carry out* the Act of August 5, 1954 (68 Stat. 674), the *Indian Self Determination Act*, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,747,842,000, *together with payments received during the fiscal year pursuant to 42 U.S.C, 300aaa-2 for services furnished by the Indian Health Service*." (*emphasis added*).

Of the IHS' lump-sum appropriation of $1,722,842,000 for FY 1996, non-earmarked funds totaled $1,364,937,000. Similarly, the FY 1997 Appropriations Act provided:

> *For expenses necessary to carry out* the Act of August 5, 1954 (68 Stat. 674), the *Indian Self Determination Act*,

> the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,806,269,000, *together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service* (*emphasis added*).

Omnibus Consolidated Appropriations Act for FY 1997, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). Thus, the FY 1997 Act is nearly identical to the FY 1996 Act except that Congress increased the Indian Health Service's lump-sum appropriation by nearly 60 million dollars to $1,809,269,000. Of this total, non-earmarked funds totaled $1,408,736,000.

Nowhere is there any suggestion in the plain language of the FY 1996 and FY 1997 Appropriations Acts that Congress intended to impose a spending cap on CSC funds.[5] Only in the Committee reports is the issue of total funding for CSC addressed and there the Committee simply makes a recommendation. Neither the report nor the recommendation rises to a binding duty. The FY 1996 Report states:

> *Contract Support Costs.* —The Committee recommends $153,040,000 for contract support costs including decreases of $11,864,000 for pay and fixed costs and $3,770,000 for support cost shortfalls." H. R. Rep. 104-173, at 97 (1995) (emphasis added); see also S. Rep. 104-125, at 94 (1995).

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[5] The plain language of the Appropriation Acts must control. *See Idaho First Nat'l Bank v. Commissioner of Internal Revenue*. 997 F.2d 1285, 1289 (9th Cir. 1993) ("[I]f the [statutory] language . . . is unambiguous, and its literal application does not conflict with the intentions of its drafters, the plain meaning should prevail."); *Environmental Defense Fund v. Reilly*, 909 F.2d 1497,1502 (D.C. Cir. 1990) (the starting point of statutory construction is "the language of the statute itself and absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive").

The FY 1997 Report states:

> *Contract support costs.—The* Committee recommends $160,660,000 for contract support. This amount includes increases over the fiscal year 1996 enacted level of $120,000 for the staffing of new facilities and $7,500,000 for the Indian self-determination fund." S. Rep. 104-319, at 90 (1996)(emphasis added); see also H. R. Rep. 104-625 (1996).

F. *IHS Budget Requests for CSC*

In both FY 1996 and FY 1997, the IHS failed to request adequate CSC to cover the existing shortfall. For FY 1996, the IHS requested $161,174,000, an increase of $15,714,000 over the previous year. However, as of the end of FY 1995, the CSC shortfall was approximately $43 million. As of March 30, 1996, the CSC shortfall just for new and expanded contracts was over $25 million. *Shoshone-Bannock*, 988 F. Supp. at 1329.

For FY 1997, the IHS requested significantly more for CSC—$200,955,000, an increase of $46,115,000—but still far short of the then existing CSC need. As of the end of FY 1996, the IHS had a CSC shortfall of approximately $62 million. Further, the IHS separately reported to Congress that its total CSC shortfall for FY 1997 was $81,956,000. See IHS CSC Annual Shortfall Report to Congress for FY 1997 (Sep. 24, 1997), at 3. Thus, the IHS requested almost $36 million less than it acknowledged was necessary to fully fund its CSC need for FY 1997.

G. *Background of the Seldovia Village's Claim*

In 1995, the Tribe and the Office of Cost Allocation, Department of Health and Human Services, negotiated an indirect cost rate of 47.3 percent for FY 1996 and FY 1997. Proposed Amendments 2 & 3 to FY 1996 AFA (with attached IDC Agreement). Based upon this rate, the Tribe's CSC need for both years was $247,696.

On January 24, 1996, the Tribe submitted to the IHS proposed amendments 2 and 3 to the FY 1996 AFA. Among other things, these amendments would have adjusted the funding in the FY 1996 AFA to provide for the payment of indirect costs under the negotiated indirect cost rate of 47.3 percent in accordance with the terms of the AFA. Section 4(B) of the FY 1996 AFA provides for the payment of contract support funds for indirect costs under section 106(a)(2) of the Act and Indian Self-Determination Memorandum No. 92-2.[6] The amount requested by the Tribe was determined based on the policies in ISDM 92-2.

At a meeting between tribal and IHS representatives held on December 3, 1996, the IHS tentatively responded that no action had been taken by the IHS on the amendments submitted almost a year earlier and that consequently these amendments were not incorporated into the FY 1996 AFA. On December 10, 1996 the Area Office, after further file review, confirmed that "we find that neither the Area [Office] nor IHS Headquarters processed the proposed amendments when received."

While the IHS agreed that $247,696 was the Tribe's CSC need, it stated that only $121,257 was available for CSC. Based upon this lack of "available" funds, the IHS did not incorporate the amendment into the Tribe's FY 1996 or FY 1997 AFA's. Instead, the IHS simply noted that it "did not have contract support cost shortfall funding available to meet [the Tribe's] needs at the time the amendment was first proposed, nor does it have those funds now." Similarly, the Final Contracting Officer's Decision seeks to justify the failure of the IHS to pay the Tribe's CSC requirement by stating that "the Alaska Area IHS did not have any new funds to award for the IDC rate change." As a result, the Tribe

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[6] The AFA provides that ISDM No. 92-2 shall apply if no revisions of this memorandum is in effect by October 1, 1995, which was the case.

suffered a CSC funding shortfall of $126,439 in both FY 1996 and FY 1997.

Although not clearly stated, the IHS's position that no funds were available was apparently based upon its process for determining available funds for CSC under ISDM 92-2, through which the IHS generally only increases its allocation of funds for CSC if the Conference Committee recommends such an increase in report language. Thus, although Congress increased the IHS' budgets for FY 1996 and FY 1997 by tens of millions of dollars in non-earmarked funds each year, the position of the IHS seems to be that these and other non-mandatory funds were not "available" for CSC.

Positions of the Parties

The Government argues that even if it accepts the *Thompson* decision, IHS is entitled to summary judgment because the funding provisions of the ISDA are not self-executing but require annual funding agreements to identify the programs, services, functions, and activities to be performed or administered, the funds to be provided, the general budget category assigned, the time and method of payment, and any other provisions to which the parties agree. Appellant agrees that how the Board rules depends upon interpretation of the relevant provisions in Appellant's AFA's for FY's 1996 and 1997, and IHS's policies ISDM 92-2 and IHS Circular 96-04.

At the time Seldovia's FY 1996 AFA was entered into, IHS was in the process of revising ISDM 92-2, so the AFA provided as follows:

> *The parties have not agreed on the amounts to be paid or the method and process for calculation and payment of contract support costs under the AFA.* The IHS has proposed a new policy, which will be the successor to ISDM 92-2. This proposal is currently being circulated for tribal comment. It is anticipated that a new policy

> will be adopted by the IHS Director on or before October 1, 1995. *It is the position of the IHS* that any payment of or calculation of contract support costs shall be made in accordance with the new IHS policy referred to herein, except that if such a new policy is not in effect by October 1, 1995, contract support negotiations shall be based on ISDM 92-2 (emphasis added).

IHS's Circular 96-04, the successor policy to ISDM 92-2, was not issued until April 1, 1996. Thus, the Government asserts that Appellant's FY 1996 AFA was governed by ISDM 92-2, and that the amount of CSC paid for that year was in accordance with this policy. According to IHS, the only question before the Board is whether IHS met its obligations under ISDM 92-2, which it argues it did.

Seldovia requested an amendment to its 1996 AFA on January 24, 1996, approximately four months into the term of the FY 1996 AFA, because it had negotiated a new indirect cost rate with HHS's Office of Cost Allocation. IHS applied the new cost rate in determining the CSC payments the Tribe was entitled to but allegedly could not pay the entire amount because of its shortfall in appropriations. Although the Tribe subsequently sought the full amount to which it was otherwise entitled, IHS maintains that Seldovia was bound by the funding scheme it had agreed to in its AFA, which limited total CSC payments to the amounts recommended by the Appropriations Committee despite an increase in the total ISDA appropriation. But Appellant cites *MAPCO Alaska Petroleum. Inc., v. United States*, 27 Fed. Cl. 405 (1992), for the proposition that the Government cannot contractually force the Tribe to accept less than full CSC's when the Tribe is entitled to full CSC's by law. It also asserts that the Government cannot lawfully benefit from a contract provision contrary to law, citing *Beta Systems, Inc., v. United States*, 838 F.2d at 1185. We agree.

IHS also renews in this Appeal its argument that Sec. 314 in the Omnibus Consolidated and Emergency Supplemental Appropriations Act for FY 1999, Pub. L. 105-277, restated the Congress's intention that the obligation to fund contract support costs is limited to the amount specifically appropriated for that purpose each year. Sec. 314 states in part:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138, 103-332, 104-134, 104-208 and 105-83 for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes.

By contrast, Appellant's position is that (1) IHS had a mandatory obligation to fully fund the Tribe's CSC requirement to the extent that funds were legally available, and (2) adequate funds were legally available in both FY 1996 and FY 1997 to fully fund the Tribe's CSC requirement. Appellant also disputes IHS' contention that it was bound by the wording of its AFA to accept a lesser amount, noting that the 1996 AFA specifically stated that Seldovia would receive CSC payments "as defined in section 106(a)(2) and (3)" of the Act (i.e., 25 U.S.C. sec. 450j-l(a)(2) and (3). According to Appellant:

> This mandatory contract language obligated the IHS to pay the Tribe's contract support requirement to the extent that funds were available in FY 1996 and FY 1997. Since more than adequate funds were available in those years, the contract and statute required the IHS to pay 100 percent of the Tribe's contract support requirement. Because the IHS failed to do so, it breached its

contract with the Tribe and the Tribe is entitled to a judgment for damages.

The Board is unable to conclude that the Tribe ever agreed in the FY 1996 AFA that the policies set forth in ISDM 92-2 were controlling. If anything, the relevant language indicates a lack of agreement by the parties as to the amounts to be funded and the method of funding.

As for Sec. 314, Appellant contends that IHS' position that it "extinguishes" the Tribe's claims for more contract support costs must mean that the Tribe previously had a valid claim. It further argues that giving Sec. 314 retroactive effect would be inconsistent with the plain language of that provision and in clear violation of the three-part test for retroactivity enunciated in *Madrid v. Gomez*, 150 F. 3d 1030 (9th Cir. 1998), citing *Landgraph v. USI Film Products*, 511 U.S. 244 (1994). The tests are (1) whether Congress has expressly prescribed the statute's proper reach: a statute can operate retroactively only with a clear statement to that effect; (2) whether the statute is retroactive under the ordinary rules of statutory construction, including its legislative history; but (3) if neither of the previous steps sheds light on the scope of the statute, then the court must apply the judicial default rule that statutes are not to be applied so as to create a "retroactive effect."

Appellant asserts that the terms of Sec. 314 are on their face prospective ("are the total amounts available" and "may use"). It cites the language of *Landgraph* that: "The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." 511 U.S. 244 at 271. The *Landgraph* court adds a footnote as follows:

> While the great majority of our decisions relying upon the antiretroactivity presumption have involved interven-

> ing statute burdening private parties, we have applied the presumption in cases involving new monetary obligetions that fell only on the government [*Ibid.*, case citations omitted].

However, we need not discuss the effect of Sec. 314 at greater length because the Board's position on that issue has already been made clear in *Cherokee* and been affirmed by the Federal Circuit in *Thompson*. Briefly, as Appellant urges, we did not find it contains the necessary requisites for retroactive application. Thus, Section 314 does not preclude summary judgment for Appellant.

Decision

Having thoroughly reviewed the parties' voluminous submissions in this matter, we find that this Appeal has no significant differences from *Cherokee*, and that the precedent in *Thompson* is controlling.

Accordingly, we grant Appellant's Motion for Summary Judgment and hold that, in the circumstances of this case, (1) the Tribe's mandatory and agreed-upon contract support costs should have been fully funded out of IHS's more than adequate lump-sum appropriations for the years in question, rather than being limited to amounts informally recommended by the Appropriations Committee; (2) IHS had an obligation to reprogram funds, if necessary, to fulfill that statutory obligation; and (3) Seldovia is entitled to an additional $252,878 in CSC to cover IHS's underpayment in FY's 1996 and 1997, together with interest calculated in accordance with the Contract Disputes Act. The Government's motions are hereby denied.

/s/ Bernard V. Parrette
BERNARD V. PARRETTE
Administrative Judge

I concur:

/s/ Candida S. Steel
CANDIDA S. STEEL
Chief Admionistrative Judge

APPENDIX B

INTERIOR BOARD OF CONTRACT APPEALS

SELDOVIA VILLAGE TRIBE	)	
	)	
Appellant	)	IBCA Nos. 3782-97, 3862-97
	)	
v.	)	APPELLEE'S SUPPLEMENTAL
	)	BRIEF IN SUPPORT OF
INDIAN HEALTH SERVICE	)	SUMMARY JUDGMENT
	)	
Appellee	)	

INTRODUCTION

This brief is submitted in response to the Board's Order of August 5, 2003. In submitting this brief, the Indian Health Service (IHS) will not reargue the legal issues addressed in the Federal Circuit's decision in *Thompson v. Cherokee Nation of Oklahoma*, 334 F. 3d 1075 (Fed. Cir. July 3, 2003). Nor are we conceding that the Federal Circuit's decision in *Cherokee* is correct. The Government has filed a petition for rehearing and rehearing en bane in *Cherokee* and we are not abandoning nor conceding legal arguments made in this case that would be affected by that decision. Rather, the purpose of this brief is to show that even if we accept the Federal Circuit's decision in *Cherokee*, Seldovia expressly agreed in its annual funding agreements (AFAs) to accept contract support cost (CSC) funding in accordance with how the IHS allocated funds for that purpose under its policies. Seldovia is bound by its agreement to accept CSC funding based upon IHS' policies governing the method and process for calculation and payment of CSC. The IHS performed its obligations under under [sic] the AFAs and its CSC policies and thus, even if we accept the *Cherokee* decision, the IHS is entitled to summary judgment in this case.

STATEMENT OF THE CASE

How the Board rules in this case depends upon interpretation of the relevant provisions in Seldovia's AFAs for FY 1996 and FY 1997 and IHS policies ISDM 92-2 and IHS Circular 96-04. The funding provisions of the ISDA are not self-executing. ISDA Section 450*l* establishes a model contract within the statute. That model contract requires that the parties enter into annual funding agreements identifying the programs, services, functions and activities to be performed or administered, the funds to be provided, the general budget category assigned, the time and method of payment, and any other provisions to which the parties agree. Section 450*l*(f)(2).

The FY 1996 Annual Funding Agreement (AFA) between the IHS and Seldovia was signed on June 27, 1995, approximately three months prior to the beginning of FY 1996. Section 3(A) of that AFA under the heading "Tribal Programs and Budget" sets forth the bargain between the parties as follows:

> The Seldovia Village Tribe agrees to administer the delivery of certain IHS services within the Seldovia Village Withdrawal Area and to provide and be responsible for the heath programs, activities, functions, and services identified below in accordance with the Compact and this Agreement, utilizing the resources transferred under this Agreement.

Emphasis added.[1] In other words, Seldovia agreed to carry out the programs with the funds to be transferred under the AFA.

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[1] This identical language is in section 3(A) of the FY 1997 FA signed on May 22,1996 approximately four months prior to the beginning of FY 1997.

The AFA for FY 1996 indicates that, at the time of signing, the parties had not agreed whether to use the existing circular for calculation and payment of CSC or to use a methodology from a circular under development. The AFA provides as follows:

> The parties have not agreed on the amounts to be paid or the method and process for calculation and payment of contract support costs under the AFA. The IHS has proposed a new policy, which will be the successor to ISDM 92-2. This proposal is currently being circulated for tribal comment. It is anticipated that a new policy will be adopted by the IHS Director on or before October 1, 1995. It is the position of the IHS that any payment of or calculation of contract support costs shall be made in accordance with the new IHS policy referred to herein, except that if such a new policy is not in effect by October 1, 1995, contract support cost negotiations shall be based on ISDM 92-2.

Section 4(B) at page 6.[2] The date October 1, 1995 was the beginning of fiscal year 1996 and also the start date of the FY 1996 AFA.

The IHS issued IHS Circular 96-04, the successor policy to ISDM 92-2, effective April 1, 1996. Because the successor policy was issued after October 1, 1995, there is no dispute between the parties that the method and process for calculation and payment of CSC under the AFA would be governed by ISDM 92-2. Seldovia acknowledges this in its

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[2] Section 4(B) of the AFA also dealt with CSC on Seldovia's tribal shares of contractible IHS Headquarters and Area "administrative functions . . . that support the delivery of services to Indians." ISDA section 450f(a)(1). CSC on tribal shares (considered a new and expanded program activity) should not be confused with CSC for ongoing contracts at issue here. In fact, Seldovia and the IHS entered into a separate settlement agreement for payment of CSC on tribal shares effective May 22, 1996. Thus, CSC on tribal shares is not at issue in this case.

claim letter to the IHS Director, Michael Trujillo, dated January 9, 1997. (Attached as Exhibit A). The letter states in pertinent part on page 2:

> Section 4(B) of the FY 1996 AFA provides for the payment of contract support funds for mdirect costs under section 106(a)(2) of the Act and Indian Self-Determination Memorandum No. 92.2 (the AFA provides that ISDA No. 92-2 shall apply if no revision of this memorandum [sic] in effect by October 1, 1995, which was the case). The amount above [the claim for $126,439] was determined based on the policies laid down in ISDM 92-2.

Thus, the parties agreed in Seldovia's FY 1996 AFA that IHS policy ISDM 92-2 would govern the method and process for calculation and payment of CSC for that fiscal year. The only question before the Board is whether the IHS met its obligations under ISDM 92-2 regarding the new indirect cost rate Seldovia received in the middle of the AFA term..

Seldovia requested an amendment to its 1996 AFA on January 24, 1996 (approximately four months into the term of the FY 1996 AFA) indicating that Seldovia had negotiated a new indirect cost rate of 47.3% with the DHHS Office of Cost Allocation. ISDM 92-2 states in Section 6 under the heading "ONGOING CONTRACTS:"

> The amount of indirect contract support funds representing the previous years's base will be distributed to Areas "recurring" to fund each Area's indirect cost need. Each contractor's need for indirect contract support shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If funds available in the Area's indirect cost base are not adequate to meet total requirements, then the amount available shall be distributed according to each contractor's proportion of total need. These funds will be awarded to the contractor

> as non-recurring funds. (See 4.A(3) for treatment of direct contract support costs).
>
> Each year, Areas are required to report additional needs for indirect contract support funds beyond the amount provided in their previous year's recurring base, or any surplus of funds provided in their recurring base based on current year needs.

Seldovia's understanding of IHS' obligations under ISDM 92-2 is stated in Seldovia's claim letter as follows:

> At the time IHS received our amendment to adopt the indirect cost rate, its obligation, as stated in ISDM 92-2 was: "If funds available in the Area's indirect cost base are not adequate to meet total requirements, then the amount available shall be distributed in accordance with each contractor's proportion of total need." IHS' own procedure provided that it would include Seldovia's need which had been demonstrated to it by documentation when it calculated the amounts of contract support funds distributed to all contractors and compact co-signers in Alaska for FY 1996. By its own admission IHS did not do this

The IHS Area Office applied the new indirect cost rate to determine Seldovia's CSC "need" for the next fiscal year (1997). Moreover, Seldovia's FY 1997 AFA contains the agreement of the parties concerning how this increased CSC need due to the new indirect cost rate should be handled. The parties agreed that any non-recurring amount due to the increased indirect cost rate was "to be determined," with the following footnote explaining what this meant:

> This amount represents non-recurring contract support funds based on Seldovia's increase in indirect rate in FY 96 and should approximately be $126,291. Concerning these funds, IHS has agreed that they will come from [sic] either "Pool Number 2 Prior Year CSC Base" or

> "Pool Number 3 Mandatory increases/Shortfall Costs" as defined in ISDM 92-2. Other non-recurring funds will not be specifically identified in this Agreement but will be provided to the Seldovia Village Tribe in the future to the same extent as they have historically been provided.

This language contains an internal contradiction because "Pool Number 2 Prior Year CSC Base (Ongoing Awards)" and "Pool Number 3 Mandatory Increases/Shortfall Funds" are contained in IHS Circular 96-04 at page 13. There are no such references in ISDM 92-2. The only reasonable inference is that the words are intended to refer to Pools No. 2 & 3, which are described in IHS Circular 96-04 as follows:

> Pool No. 2 Prior Year CSC Base (Ongoing Awards). The amount of indirect contract support funds representing the previous year's base will be distributed to Areas as "recurring" to fund each Area's indirect cost need. Each awardee's need for indirect CSC shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If the funds available in the Areas's indirect cost base are not adequate to meet all awardee's requirements, then the amount available shall be distributed according to each awardee's proportion of total need, except that prior year funds should not be reduced if justified as described below. These funds will be awarded to the contractor as non-recurring funds.
>
> Pool No. 3 Mandatory Increases/Shortfall Funds. Mandatory increases that represent a percentage of the Area's prior year recurring indirect cost base are distributed annually as available. Additional shortfall funds may also be made available to the IHS and allocated to Area offices for this purpose. Since awardees are required to rejustify their needs for indirect CSC each year, amounts required for indirect CSC may exceed the amount of available for this purpose. Mandatories should be allocated in such a manner as to provide increases to awards

based on each awardee's proportion of total additional need. If additional need is proportionately greater for some awardees, they will receive a greater percentage of CSC mandatories and shortfall funds.

Prior year funds provided for indirect CSC to each awardee, if justified in subsequent years, shall not be reduced by the IHS, except as authorized in section 106(b) of the ISDA. Awardees should expect to receive these funds continuously, only if they continue to be justified for at least the same amount or greater annual need. They are awarded as non-recurring funds to enable the Area to adjust amounts previously awarded if the amount of costs allocated to the IHS for reimbursement should decrease. If amounts previously awarded for indirect CSC are not justified by an awardee in the subsequent year, they will be made available for distribution to other awardees in the Area with unfunded CSC needs for this purpose.

The Area Office did not conduct a proportionate distribution of its indirect cost base for either FY 1996 or FY 1997 because there were no new funds allocated to that base that could be used for a proportionate distribution without decreasing existing contracts for other tribes.

The record in this case contains a budget table submitted in response to Seldovia's interrogatory 4 showing the distribution to the IHS Areas of the CSC funds earmarked in the appropriation committee reports for fiscal years 1996 and 1997. (Attached as Exhibit B). The Alaska Area base for FY 1995 (first column) was $38,968,700. The Alaska Area base for FY 1996 (4th column) was $40,239,500. The increase is due to certain Alaska tribes receiving a total of $1,190,000 from the ISD Fund of $7,500,000 for that year for new and expanded contracts, and an annualized amount for the new Kotzebue facility of $80,000. The Alaska Area base for FY 1997 (8th column) was $40,644,500, again the small increase

due to distributions from the ISD Fund for that year and an annualized allocation of $120,000 for the new Kotzebue facility. The Alaska Area received no new CSC funds for proportionate distribution to ongoing contracts during FY 1996 or FY 1997. (Response to Appellant's Request for Admissions No. 8).

ARGUMENT

Seldovia claims, despite its agreement that any additional indirect costs would be determined by IHS' policies, that when it received its new indirect cost rate, it was entitled by statute to additional CSC funding based on applying the new rate to its program base for FY 1996 and FY 1997. But this is not the funding scheme that Seldovia agreed to.

Instead, Seldovia agreed in its FY 1996 AFA that ISDM 92-2 would govern the method and process for calculation and payment of CSC. ISDM 92-2 does not require immediate payment of CSC based on a new indirect cost rate. Rather, under ISDM 92-2, a change in the indirect cost rate mid-term in the AFA affects the calculation of the contractor's CSC "need" for the next year. Furthermore, ISDM 92-2 provides that the source of funding for indirect costs is the amount allocated to the Alaska Area for its indirect cost base. ISDM 92-2 in Section 6 (see page 4 above) provides that if funds are not available in the Area's indirect cost base to meet the total indirect cost "need" of all contractors, the amount available in the Area's indirect cost base for all Area contractors will be distributed according to each contractor's proportion of total need. The were no new funds allocated to the Area's indirect cost base for proportionate distribution, and the IHS did not reduce indirect cost funding for any contractor to make funds available for proportionate distribution. That would violate ISDA section 450j-l(b). As no new funds were available in the Alaska Area's indirect cost base for fiscal years 1996 and 1997, then, according to ISDM 92-2, Seldovia's new indirect cost rate increased Seldovia's "need" for CSC, but no

additional funding was required. Instead, ISDM 92-2 provided that "[d]eficiencies for existing contracts will be reported in the annual report to Congress required by Section 106(c).[3]

It is clear from the text of ISDM 92-2 (see Section 6 quoted above) that the funds available for proportionate distribution that Seldovia seeks are limited to the Alaska Area's indirect cost base. Beyond those funds, ISDM 92-2 provides for making changes to a tribal contractor's "need" for CSC for ongoing contracts due to, among other things, a change in the contractor's indirect cost rate. In this case, IHS was notified of the change in Seldovia's indirect cost rate four months into the annual term of the AFAs in Alaska, too late to change retroactively the distribution of indirect cost funds to Alaska contractors. Thus, even if the Alaska Area had retroactively changed Seldovia's need calculation, that change would not have resulted in any increased funding under ISDM 92-2.

The same is true for FY 1997. Seldovia specifically agreed that any funds to pay its increased indirect cost need of $126,291 as a result of its new indirect cost rate will come from either Pool 2 or Pool 3 described in IHS Circular 96-04. In its claim letter Seldovia asserts:

> Our legal counsel advises us that IHS' total disregard of its own policies and of Seldovia's rights thereunder, at least to a pro rata share of the contract support funds available to the Alaska Area Office in FY 1996 was arbitrary and capricious and that the government is liable to us for the loss occasioned by its failure to process our amendment . . . notwithstanding the reference to "Pool No. 2 Prior Year CSC Base" and specific reference to

[3] ISDA, 25 U.S.C. 450j-l(c) required the Secretary to provide a report to Congress each year that would include "an accounting of any deficiency of funds needed to provide required indirect costs to all contractors for the current fiscal year."

> the increase in Seldovia Village Tribe's indirect cost rate and to the specific amount of $126,291, all in footnote 1, page 5. of the FY 1997 AFA.

Emphasis added. The underscored language is clear that Seldovia asserts its claim despite what it agreed to in its AFAs. We submit that Seldovia must be held to its contracts. Seldovia has not disputed that there were no new funds in the Alaska Area's indirect cost base in either FY 1996 or FY 1997 for proportionate distribution and IHS could not reduce other tribe's contracts to make funds available for a proportionate distribution. ISDA, 25 U.S.C. 450j-l(b). Thus, the IHS met its obligations to Seldovia under its policies as incorporated by Seldovia in its AFAs. The IHS is entitled to summary judgment in this case.

CONCLUSION

For the aforementioned reasons, the Board should grant Appellee's motion for summary judgment in this case.

Respectfully submitted:

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